REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 7 OF 2017

REPUBLIC ....PROSECUTOR

VERSUS

GOHU NDUNGI DZIMBA ....1ST ACCUSED

SULEIMAN BAYA MWAR ....2ND ACCUSED

SAMSON KAMBI YAA ....3RD ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Mayaka advocate for the accused persons

J U D G M E N T

The accused persons before me jointly charged of murder contrary to Section 203 and 204 of the Penal Code. It's alleged that on 4.3.2017 at Mrima Wa Ndege area in Vitengeni Division Ganze, they jointly with others not before Court murdered **Kazungu Kambi Mure**. Upon the plea being read and explained each of the accused pleaded not guilty. Following that position taken by the accused persons, the prosecution called a total of seven (7) witnesses and the accused persons also gave their respective defences denying the act of killing the deceased.

The prosecution case can be summed up as follows: **(PW1) - Zawadi Kazungu** gave unsworn evidence and testified that she stayed with her grandmother. On the material day the witness alluded to the events of having served the deceased with an evening meal. Thereafter, a motor bike carrying three passengers namely **Kiasi, Gohu** and **Murungaru** entered into the compound. She was able to hear a conversation between the three men and the deceased on issues whether, there is somebody who could give him a phone to inform other family members that he was being taken away. Secondly, she was able to witness money change hands totaling about Kshs.5,500/= duly handed over by the deceased to her grandmother. Thirdly, one **Murungaru** asked the deceased to hand over his mobile phone which he vehemently refused. Further evidence in chief by **(PW1)** indicates that the three men took the deceased away. She was later to receive information that the deceased has been attacked and the assailants were in the process of using petrol to burn him down. In the testimony of **(PW1)** she however did not witness these last moments of the deceased with the three persons.

(PW2) – Changawa Mure testified that on 4.3.2017, the deceased went visiting his children at her home. In the course the accused persons drove in a motorcycle. In her presence **(PW2)** told the Court that the 1st accused initiated a communication with the deceased. In a short while the three left with the deceased riding the same motorcycle. Thereafter, **(PW2)** stated that she was to learn from the grandchildren that the deceased has been killed. She therefore did not witness the incident.

(PW3) – Kitsao Karisa gave evidence to the effect that on 4.3.2017, on or about 2.00 p.m. he went to the stage to look for a vehicle incidentally, (PW3) was not able to get any vehicle soon, and as a result he hired a motor bike being driven by **Murungaru** at the time as having a conversation with the 1st accused. Thereafter, both of them boarded the motorcycle to the home of **(PW2)** where the deceased had allegedly gone to visit his children. According to **(PW3),** they picked the deceased and drove towards a certain school where the 1st accused and the deceased disembarked the motor cycle rider by the name **Murungaru** dropped him at his home. As the day progressed, **(PW3)** told the Court that at about 8.00 p.m. he heard that the same **Kazungu** has been murdered. That is how he proceeded to the 1st accused home to find out under which circumstances did the deceased pass on. In the evidence of **(PW3),** in the school where the 1st accused and the deceased alighted there were other people whom he positively identified as the second and third accused persons. They were people known to him prior to this fateful day of the death of the deceased.

(PW4)- Christopher Charo testified as a businessman at Mrima Wa Ndege where he owns a kiosk which sells petrol and other household

goods. In his recollection on 4.3.2017, while at the said ship one **Rama** walked in and bought one litre of petrol. He filled the motor bike and left the shop. The witness pointed out to the Court that soon thereafter, he heard that the deceased has been killed.

(PW5) – Kahindi Mwalimu also a businessman at Mrima Wa Ndege testified that on 4.3.2017 one **Rama** went to his shop and hired his motor cycle. According to **(PW5)** he negotiated with **Rama** the money payable for hiring the motor cycle and on reaching an agreement he released it for use by **Rama**. However, the details of the journey remained scanty and not necessarily part of the agreement. In **(PW5)** own evidence it was the same **Rama** who informed them of the death of the deceased.

(PW6) – was one **Dr. Ndalo** who gave evidence on the post-mortem examination report on behalf of his colleague – **Dr. Khadija.** According to **(PW6)** the post mortem examination done on the body of the deceased revealed a charred whole body duly burned down extensively. The circumferential burns involving the head, neck, plus upper and lower limbs were measured at 100% percentage and assessed as 3rd degree burns of the entire human anatomy system. **Dr. Ndalo** concluded that as per **Dr. Khadija**, the deceased death was due to the complications of burns that led to end organ damage.

(PW7) – Sgt. Stephen Owuor was a key prosecution witness divulging into the nature of the investigations and on how the accused persons came to be indicted of the offence of murder against the deceased. **(PW7)** recorded witness statements of the six other witnesses whose statements contributed substantially in finding the accused persons culpable to the crime. On that evidence, **(PW7)** recommended for the accused persons to be charged and answer to as to their involvement as alleged by the witnesses. It is obvious with the prosecution case depended on the sets of description from the witnesses, accused persons were placed on their defence pursuant to Section 306 (2) of the Criminal Procedure Code.

What was their take of the allegations?

The 1st accused person on oath denied killing the deceased. He puts his character as one of the supporting ground that being a clan-elder he is involved in peace building in the village assisting the Chief of the location. He also came to know of the killing while at the scene where a conflict arose between the deceased and other people. He alludes to the fact that as a clan elder he tried to intervene but was overwhelmed.

(DW2) – Suleiman Baya Mwar also elected to give a sworn statement and subsequently denied any participation with the death of the deceased. According to **(DW2),** on or about 4.00 p.m. there was a scuffle involving the deceased and other members of the public. On arrival at the scene he made attempts to separate them but the efforts were not successful.

(DW3) – Samson Kambi Yaa testified on oath and denied that the allegations of implicating him with the offence were true as stated by the prosecution witnesses.

Analysis and determination

The main issue in this trial must be on the question of whether the prosecution proved beyond reasonable doubt that the accused persons jointly killed the deceased on 4.3.2017 at Mrima Wa Ndege.

First, the offence of murder is textual zed and identified to be proven by the prosecution in cases where the following elements exist:

> ***(a). The death of the deceased.***
>
> ***(b). That the death was unlawfully caused.***
>
> ***(c). That in causing death, the accused person or persons had malice aforethought.***
>
> ***(d). That in this process to accomplish the commission of the crime the offender or offenders were positively identified.***

Before ideal with each of this ingredient, I wish to delve into the question of the legal burden of proof expected of the state through this trial. It is trite that all material times the burden of proof to secure Judgment in a criminal case rests with the prosecution. This is the long standing legal principle enunciated in several case Law. In this respect, in the landmark case of **Woolmington v DPP {1935} AC 462 Lord Sankey** held:

> ***"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilty, he is not bound to satisfy the jury of his innocence. Throughout the wits of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilty."***

Wherein **Lord Denning** in **Miller v Minister of Pensions {1947} 2 ALL ER 372** started:

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of possibility. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."***

I have examined the evidence as adduced by the prosecution witnesses, the death of the deceased is not in dispute. The witnesses allude to the fact of death whereas also the accused persons in their moving defence confirmed that they came to know of the deceased death who hailed from the same village. Further, the postmortem examination report by **Dr. Kombe** dated 14.10.2018 was in reference to the body of the deceased. He was duly identified by **Jibril Bishar** and **Hassan Haruse** that therefore disposes the ingredient of death beyond reasonable doubt.

Secondly, the prosecution evidence must answer to the question whether the death of the deceased was unlawfully caused. It is important to observe that all homicides are considered unlawful unless excusable or justified in Law. That is the principle enunciated in **Guzambizi s/o Wesonga v R {1948} 15 EACA 65** the salient features of the testimonies of **(PW1), (PW2), (PW3)** are to the effect that on 4.3.2017 the accused persons were driven into the home in which the deceased had gone to visit his children. On entry to the home and the presence of **(PW1)** and **(PW2),** they left with the deceased for an unknown destination. The evidence of **(PW3)** is of great significance with regard to the last known destination in which the 1st accused and the deceased were dropped by the motor cycle rider. It is at that locus in quo **(PW3)** also saw the 2nd and 3rd accused amongst other people. The context of the evidence by **(PW1), (PW2)** and **(PW3)** is that on the material day until the said news trickled in the deceased was alive with no signs of bodily injuries.

In answer to this ingredient soon thereafter when **(PW3)** saw the deceased in company of the motor cycle rider and the 1st accused. The fact of the matter is discovery of his body extensively burnt beyond recognition. The pathologist evidence **(PW6)** is essential as in his statement. The materiality of the unlawfulness of the death is settled. In the case of **Benson Ngunyi Nundu v R CACRA No. 171 of 1984.** It was stated that:

> ***"in cases where the body is available and has been examined, a postmortem report must be produced and that the normal and straightforward means of seeking to prove cause of death is by producing the post-mortem examination report."***

The *actus reus* required for the offence of murder contrary to Section 203 of the Penal Code is the unlawful act or omission causing the death of another human being. The unlawful act must be one which is dangerous and likely to cause injury to another. In the case of **Joash Wandanda v R CACRA No. 83 of 1984** the Court remarked that:

> ***"an act is dangerous in the sense that a sober and reasonable person would inevitably recognize that it carried some risk of harm infact that it caused death."***

That the deceased was assaulted and severely burnt. He sustained multiple burns involving the entire human anatomy including vessels and muscles. None of a human being system or body parts was spared. That irreparable burning of the deceased became the cause of death as opined by **(PW6).**

I therefore find that the prosecution has proved the second ingredient of the offence. The third ingredient is whether whoever committed the unlawful act or omission was actuated with malice aforethought. Under Section 206 of the Penal Code the prosecution is expected to prove manifestation of malice aforethought. To prove malice aforethought, the rudiments which the Law places on the shoulders of the prosecution is to prove that the act was done with the intention of causing death, or that it was done with the intention of causing such serious bodily harm or that the accused knew or had reason to know that the death would be probable and not only likely consequences of his act or but it was foreseeable that death would result.

In assessing factors considered for malice aforethought to be manifested in the crime of murder, the Court in **Rex v Tubere s/o Ochen {1945} 12 EACA 63** observed that:

"the Court should undertake a situational analysis on the weapon used, the manner in which it is used, the part of the body injured and inferential evaluation of the accused conduct in the entire process of committing the crime."

The ingredient also highlights the brutality of the killing, well calculated and planned by the accused persons. (**See Morris Aluoch v R CACRA No. 47 of 1996, Ernest Bwire Abanga alias Onyango v R CACRA No. 32 of 1990).**

After reviewing the evidence of the respective witnesses, the act of burning of the deceased was intentional with full knowledge that the intended bodily injury was probable to cause the death of the deceased. There are three ways circumstantial evidence satisfies the criteria of malice aforethought to the facts of this case. First, the persons who planned and executed the burning of the deceased did something unlawful, in the sense of aiming it at, another human being. Secondly, the unlawful act so voluntarily done was of such a kind that fatal injuries resulted in the immediate death of the deceased. Thirdly, the act caused the death. Surely, the persons who inflicted the very extensive burns upon the deceased cannot be allowed to say they did not intend to kill, because that is to say that to admit that I am a real murderer. There seems to be no escaping the conclusion that in this case the prosecution has discharged the burden to prove malice aforethought.

The effect of the view taken brings me to the question as to who really killed the deceased. On this issue, I am guided by the principles in the case of **R v Turnbull & Others {1976} 3 ALL ER 549.** In this case the Court stated interalia that:

> ***"on identification the Judge ought to examine closely the circumstances in which each witness came to identify the accused. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impended in any way? Had the witness ever seen the accused before? How often had he any special reason of remembering the accused……"***

In **Anjononi v R {1980} KLR 59** the Court held:

"Recognition of an assailant is more satisfactory, more assuming, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

While on this ingredient, it is worth referring to the striking evidence of **(PW1)** and **(PW2)** in the respect of recognition of the accused persons. The classical assertion comes from the recognition evidence of **(PW3).** The witness stated at length that the point where the motor cycle rider, the 1st accused and the deceased alighted in the large number of people he managed to positively identify the 2nd and 3rd accused. On this issue **(PW3)** description of the accused persons coupled with prior knowledge of familiarity with them left no doubt as to their identity and being placed at the scene of the murder.

Following upon the accused persons being recognized as the perpetrators, no evidence was forthcoming in their defence to credibly controvert that inference. The prosecution has therefore discharged the burden of proof that on the material day there was no mistaken identity of the accused persons. It is perhaps, worth devoting a little more space on the provision under Section 20 of the Penal Code on principal offenders and that of common intention in Section 21 of the same Code. **Section 21 *"envisages two or more people forming a common intention to commit a crime together and the offence is actually committed, whether by one or more of them."***

In such circumstances the Law treats all those involved as joint offenders and each one of them is deemed to have committed the offence. **(See Kamweru & Others v R {1953} 20 EACA 251, Opoyo v Uganda {1967} EA 752, Amer & 9 Others v R {2000} KLR 267).** The evidence of **(PW3)** taken within the context of Section 20 and 21 of the Penal Code, the last person to be seen with the deceased alive included the three accused persons before Court. The genesis of this crime is traceable from the time the motor rider in company of the 1st accused went for the deceased as he was visiting his children.

In **Taylor Weaver & Donovan 21 CRAPP R 20 AT 21**, the Court stated thus:

"It has been said that the evidence against the applicants is circumstantial, so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

The force of evidence by **(PW1)** – **(PW7)** taken in its inclusivity wholly agrees with the facts of this case that this murder was jointly committed by the accused persons with others not before Court. There were many positive aspects of the evidence by the prosecution involving the accused persons which were never contradicted or rebutted in their respective defences. It is settled Law that circumstantial evidence is considered as a chain and each piece of evidence that links an accused person to the crime is relevant. There are no combined factors on the part of the defences which raises a reasonable doubt to exonerate them from the commission of the crime.

It follows from what I have said that the prosecution has discharged the burden of proof in consonant with the principles in **Woolmington** and **Miller cases (supra)** to find each one of them guilty of the offence of killing the deceased contrary to Section 203 of the Penal Code. Paying homage to the words of the statute, I simply enter conviction and thereafter sentencing hearing be get for an appropriate sentence in terms of the guidelines in **Francis K. Muruatetu v R {2017} eKLR.**

Sentence

In the circumstances of this case. I have taken into account the principles of Sentencing, moral culpability of the convict, the responsiveness on the pre-sentence report, mitigation and aggravating factors. This was basically a murder committed with malice aforethought. I give due regard that aggravating factors outweigh any mitigation circumstances presented by the convict. A further consideration in this matter is the credit on sentence in compliance with section 333 (2) of the Criminal Procedure Code.

These competing considerations in conjunction with the balancing act of discretion and the principle of proportionality I sentence each of the convict to a term of imprisonment of 35 years w.e.f **23rd March, 2017** the date of arraignment before the trial court.

Right of Appeal 14 days.

It is so ordered.

DATED, READ AND SIGNED AT MALINDI ON 31st DAY OF MARCH, 2022

....

R. NYAKUNDI

JUDGE

IN THE PRESENCE OF:

1. MR MWANGI FOR THE STATE

2. NDUNGI – 1ST CONVICT

3. SAMSON KAMBI – 3RD CONVICT

4. SULEIMAN BAYA MWARI EXECUTION OF JUDGEMENT DEPENDENT ON HIS RECOVERY FROM ILL HEALTH.